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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 339

JAMES J. MOROney, *Petitioner*

v.

J. M. McKIBBEN, ET AL., *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Carl L. Shipley and Samuel Resnicoff, on behalf of James J. Moroney, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above captioned case on May 9, 1957, affirming a judgment of the United States District Court for the District of Columbia granting summary judgment for respondents on July 25, 1956.

OPINION BELOW

The opinion of the court below is reported at page 1-a of the Appendix hereto.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Whether the court below erred in holding that removal of a Postmaster of the First Class is a matter almost entirely within the ambit of executive discretion despite the provisions of 39 U.S.C. 31(a)?

2. Whether the court below erred in holding that dismissal of a Postmaster on charges unsupported by substantial evidence of such cause as will promote the efficiency of the Service is beyond the scope of permissible judicial review?

3. Whether an officer appointed by the President can be dismissed by a superior other than the President in the absence of a specific delegation of authority?

4. Whether the Administrative Procedure Act applies to federal personnel actions?

STATUTES AND REGULATIONS INVOLVED

39 U.S.C. 31(a):

> "Postmasters of the first, second and third classes shall hereafter be appointed in the classified civil service without term by the President by and with the advice and consent of the Senate . . ."

5 U.S.C. 863:

> "No permanent or indefinite preference eligible who has completed a probationary or trial period employed in the civil service, . . . shall be discharged . . . except for such cause as will promote the efficiency of the service . . ."

STATEMENT OF THE CASE

Petitioner was appointed to the position of Postmaster of the Pleasantville, New York, Post Office by President Roosevelt in 1935. In 1938, he was reappointed when the provisions of 39 U.S.C. 31(a) went into effect, and served until May 22, 1955, when he was dismissed on charges of having been physically absent from the post office for 4 hours and 16 minutes on August 25, 1954, 2 hours and 2 minutes on September 2, 1954, and 3 hours and 15 minutes on September 22, 1954, in violation of Art. 21, Ch. 1, Post Office Manual, which provides in pertinent part:

> "21 . . . postmasters shall devote not less than 8 hours during the business part of the day to the conduct of their offices and the performance of duties appropriate to their positions."

The charges did not accuse petitioner of being on other than post office business while absent, and no proof was adduced to show that he was on other than post office business while outside the post office during the stated absences. On appeal to the Second Civil Service Region, the Hearing Officer who saw the witnesses and heard the testimony made Findings and Recommendations as follows:

> "It is the finding of this office, based on all of the evidence of record, that the Post Office De-

partment's decision to effect the appellant's removal from the position of Postmaster was improper and was not based upon sustained charges."

The Postal Inspectors conceded they were unable to state that petitioner was not conducting postal business during the periods of alleged absence from the office. No proof was offered to show petitioner devoted less than eight hours a day to his job.

However, on May 15, 1956, the Civil Service Commission Board of Appeals and Review reversed the Regional Office and sustained the charges. On July 25, 1956, the United States District Court for the District of Columbia granted the Government's motion for summary judgment. On May 9, 1957, the United States Court of Appeals for the District of Columbia Circuit handed down a per curiam decision, as follows:

> "The judgment of the District Court is affirmed. Saggau v. Young, U.S. App. D.C. , 240 F. 2d 865; Hargett v. Summerfield, U.S. App. D.C. , 243 F. 2d 29, affirming 139 F. Supp. 876; Williams v. Cravens, 93 U.S. App. D.C. 380, 210 F. 2d 874."

ARGUMENT

I. The Removal of a Postmaster of the First Class Is Not a Matter Committed Almost Entirely to Executive Discretion.

The court below disposed of petitioner's case in a one sentence per curiam decision giving no reasons and citing only *Hargett* v. *Summerfield*, 243 F. 2d 29, and *Saggau* v. *Young*, 240 F. 2d 865, reprinted at pp. 2a and 5a of appendix hereto, both of which it had decided earlier and both of which involved remedy of

presidentially appointed Postmasters. Therefore, the law applied in those cases must be taken to be the law applied in petitioner's case, despite factual differences.

Prior to 1938 all first class Postmasters were appointed by the President by and with the consent of the Senate, with no restrictions on the President's power of removal. In 1938 Congress blanketed these Postmasters into the classified civil service, although they are still appointed and commissioned by the President, and must be confirmed by the Senate. 39 U.S.C. 31(a). After appointment in the classified civil service, it would seem the President's unrestricted power of removal, *Myers* v. *United States*, 272 U.S. 52; *Humphrey's Executor* v. *United States*, 295 U.S. 602; *Shurtleff* v. *United States*, 189 U.S. 311, 315, 316, is now severely curtailed by the Lloyd-LaFollette Act (5 U.S.C. 652) and the Veterans Preference Act (5 U.S.C. 863); in removal of Postmasters.

Section 14 of the Veterans Preference Act limits the President to removal of Postmasters only for "such cause as will promote the efficiency of the service." It is obvious from a reading of 39 U.S.C. 31(a) that Congress intended to restrict the President's power to remove Postmasters and confer on the appointed incumbent a statutory tenure. Congress has similarly limited the President's removal power as to other appointed officials. For example, the 1926 law creating the National Mediation Board, 44 Stat. 579, 45 U.S.C. 154, provides that a member can only be "removed by the President for inefficiency, neglect of duty, malfeasance in office, or ineligibility, but for no other cause." In 1935 the act creating the

National Labor Relations Board, 49 Stat., 29 U.S.C. 153(a), used substantially the same language. When Congress created the Maritime Commission in 1936, 49 Stat. 1985, 46 U.S.C. 1111(a), it provided that "Any member may be removed by the President for neglect of duty or malfeasance in office." The 1938 Act creating the Civil Aeronautics Board, 52 Stat. 980, 49 U.S.C. 421, uses similar language, as does the 1946 Act establishing the Atomic Energy Commission, 60 Stat. 756, 42 U.S.C. 1802(a)(2). The Indian Claims Commission Act of 1946, 60 Stat. 1050, 25 U.S.C. 70(b) provides that members shall hold office during good behavior, and can only be "removed by the President for cause after notice and opportunity to be heard." The Subversive Activities Control Board members can be removed "by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause," as provided in the Act of September 23, 1950, 64 Stat. 997, 50 U.S.C. 791(a). It is apparently patterned after the limitation placed in 1921 on the President's power to remove the Comptroller General—stated grounds and "for no other cause and in no other manner except by impeachment." 42 Stat. 23, 31 U.S.C. 43. These statutes limit the President's discretion.

In *Humphrey's Executor* v. *United States*, 295 U.S. 602, this Court held that when an act creating an agency provides for removal only for stated causes, the President cannot remove an incumbent at his discretion. Nonetheless, the court below insists on relying on *Keim* v. *United States*, 177 U.S. 290 (1900), and *Taylor* v. *Taft*, 24 App. D.C. 95 (1904), as authority clearly placing removal of executive department em-

ployees within the ambit of executive discretion. These cases stated the law 50 years ago, but not since the above referred to Acts of Congress, and reliance upon them is clearly wrong.

In its decision affirming petitioner's dismissal, the court below turns to *Hargett* v. *Summerfield*, 243 F. 2d 29, and *Saggau* v. *Young*, 240 F. 2d 865, both of which it uses to restate its view that "employee removal and discipline are almost entirely matters of executive agency discretion." There is nothing in the Veterans Preference Act to support such a proposition.

Petitioner contends that this is an erroneous statement of the law. Under Section 14 of the Veterans Preference Act, petitioner is entitled to remain in office until the President proves by substantial evidence on the whole record, that his dismissal is for a "cause" that will promote the efficiency of the service. Where an administrative ruling is "not supported by substantial evidence, it must be treated as having been arbitrary, capricious, or so grossly erroneous as to imply bad faith." *Wagner Whirler Corp.* v. *U. S.*, 121 F. Supp. 664. Review and clarification of this question by this Court is necessary to secure a national right and uniformity of judgments. All postmasters who are veterans are deprived of the benefits of the Veterans Preference Act under the present decisions.

II. The Court Below Misconstrues the Scope of Permissible Judicial Review as to Executive Removal of Postmasters.

In *Humphrey's Executor* v. *United States*, 295 U.S. 602, at page 632, this court left open the question of scope of permissible review of executive personnel removal actions, and left such cases "for future con-

sideration." Whatever may be the limitations on judicial review of executive actions removing civil service personnel under the Lloyd-LaFollette Act and the Veterans' Preference Act, a different situation must arise when the employee is appointed and commissioned by the President with the consent of the Senate. Offices which Congress creates can have tenure beyond the President's discretion, if Congress so decides. These offices may have quasi-legislative and or quasi-judicial functions as well as functions purely executive. The agency offices referred to hereinabove are of that type. Congress has, for example, the responsibility under the Constitution to establish post offices: *Art. I, U.S. Const.* Congress has chosen to fix the tenure of Postmasters, even though it permits the President to appoint them. 39 U.S.C. 31(a). A fair reading of 39 U.S.C. 31(a) makes it clear that removal of Postmasters is no longer committed to executive discretion, but must be based only on cause. Whether or not there is cause is a question which must be determined by evidence on the whole record. If the President is free to determine cause, and have his decision remain beyond the pale of judicial review, there is no limitation on his discretion, and 39 U.S.C. 31(a) becomes a nullity.

Yet this is precisely the rule applied by the court below in petitioner's case, as may be seen from an examination of the law on which it relies. It certainly makes no pretense to have examined the administrative record to determine whether there was substantial evidence of cause for dismissal which would promote the efficiency of the service, as the statute requires. It makes no pretense to have reviewed the agency action for arbitrariness.

The confusion and lack of uniformity in judicial decisions may be seen in the reported cases. In *Suggan* v. *Young*, 240 F. 2d 865, the court below said, "this court has held many times that it will not review the action of executive officials in dismissing executive employees, except to insure compliance with statutory requirements." In *Boylan* v. *Quarles*, 235 F. 2d 834, there was no "substantial departure from applicable procedures, no misconstruction of governing legislation, nor any like error going to the heart of the administrative determination." In *Kohlberg* v. *Gray*, 207 F. 2d 35, the court would not "inquire into the guilt or innocence of the employee as to the charges upon which he was removed." See also *Levine* v. *Farley*, 107 F. 2d 186. In *Kutcher* v. *Gray*, 199 F. 2d 783, the court below said "administrative determination by the employing agency of what constitutes cause for discharge will not be judicially reviewed." See also *Carter* v. *Forrestal*, 175 F. 2d 364. In *Jordan* v. *United States*, No. 223-56 decided June 5, 1957, the Court of Claims holds "We do not inquire whether plaintiff was removed without cause if the procedure prescribed by the Lloyd-LaFollette Act has been followed." However, in *Knotts* v. *United States*, 121 F. Supp. 630, the Court of Claims holds that the scope of permissible review under 5 U.S.C. 652 extends to the question of "cause," as it had previously held in *Gadsden* v. *United States*, 78 F. Supp. 126.

Thus, it may be seen that the court below persists in applying the narrow scope of review suggested in the *Myers* case, while the Court of Claims oscillates between the review permitted in the *Humphrey's* case and the *Myers* case. Neither court seems to give effect

to the distinction between appointments made by the President, and those made by inferior officers, and the cognizable limitations on the power of removal, as set forth in *United States* v. *Perkins*, 116 U.S. 483.

In the *Myers* case, supra, the restrictions on the President's power to remove a Postmaster provided in 39 U.S.C. 31 were held unconstitutional. The valid portion of this law remained in effect from 1876 until 1938, when a new restriction on the President's power to remove was provided in 39 U.S.C. 31(a). If Postmasters have quasi-legislative and quasi-judicial functions (39 U.S.C. 225, as explained in *Esquire* v. *Walker*, 55 F. Supp. 1015, rev. on other grounds 151 F. 2d 49), it would seem that the *Humphrey's* case, supra, rule would bind the court below to extend the scope of permissible review to a determination of whether petitioner's removal for cause is supported by substantial evidence on the whole record. Otherwise there is no check on the President's discretion or review to see whether he limits removals to the causes stated in 5 U.S.C. 863. Either the limitation of the President's power to remove Postmasters in 39 U.S.C. 31(a) is unconstitutional, as this Court determined its predecessor (39 U.S.C. 31) to be, or petitioner is entitled to the same scope of judicial review of his dismissal as would be the case in any other administrative proceeding. Petitioner urges the Court to clarify the rights of Postmasters under 39 U.S.C. 31(a) and to define the scope of judicial review to which they are entitled when dismissed for alleged cause to promote the efficiency of the service.

Despite the persistent decisions of the court below, as cited hereinabove, holding that the question of

"cause" under Section 14 of the Veterans Preference Act is non-reviewable, there is nothing in the statute to justify this position. This court has never passed upon the question. If, despite the *Myers* case, supra, 39 U.S.C. 31(a) is constitutional, then due process requires reviewability of the question of cause to determine whether it is based on evidence and is not arbitrary. Title 39 U.S.C., Section 31(a), limits executive discretion, and brings into play Section 10(e) of the Administrative Procedure Act (5 U.S.C. 1009), requiring judicial review. In the light of 39 U.S.C. 31(a), 5 U.S.C. 863, and 5 U.S.C. 1009, the decision of the court is clearly wrong, and deprives petitioner and all other Postmasters who are veterans of a national right.

III. The Assistant Postmaster General Had No Authority to Dismiss Appellant.

Appellant was appointed by the President by and with the consent of the Senate. The President has never delegated his authority to dismiss postmasters to the Assistant Postmaster General. The *Hargett* case, supra, relied on in the case at bar, holds that there is a presumption of authority to act. Appellant contends there can be no such presumption as to the Assistant Postmaster General.

IV. The Administrative Procedure Act Applies to Federal Personnel Actions.

The court below holds in the *Hargett* case, which is the basis for its decision in the case at bar, that the removal of executive agency employees is a matter of discretion and not subject to the judicial review provisions of the Administrative Procedure Act. Appellant contends it is. *Laden* v. *Crossen*, 108 F. Supp.

240; *Fischer* v. *Haeberle*, 80 F. Supp. 652; *Wettre* v. *Hague*, 74 F. Supp. 396; and see also *Blackmar* v. *Guerre*, 342 U.S. 512; *Hargett* v. *Summerfield*, 243 F. 2d 29. The decisions are in clear conflict and should be made uniform.

CONCLUSION

Petitioner respectfully submits that the case at bar involves a question of national rights and uniformity of judgments, and requests that a writ of certiorari issue to the court below to review the case. The pertinent statute dealing with the removal of a Postmaster of the first class has not been reviewed by this Court. As set forth hereinabove, there are special and important reasons for granting certiorari in this case in accordance with Rule 38(5)(c) of this Court's Rules.

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 13558

JAMES J. MORONEY, APPELLANT

v.

N. R. ABRAMS, Assistant Postmaster General, *et al.*,
APPELLEES

Appeal from the United States District Court
for the District of Columbia

Decided May 9, 1957

Mr. Carl L. Shipley, and *Mr. Samuel Resnicoff* of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of Court, for appellant.

Mr. Howard E. Shapiro, Attorney, Department of Justice, for appellees. *Assistant Attorney General Doub*, *Messrs. Oliver Gasch*, United States Attorney, *Samuel D. Slade* and *Alan S. Rosenthal*, Attorneys, Department of Justice, were on the brief for appellees.

Before EDGERTON, *Chief Judge*, and PRETTYMAN and WILBUR K. MILLER, *Circuit Judges*.

PER CURIAM: The judgment of the District Court is affirmed. *Saggau* v. *Young*, —— U.S. App. D.C. ——, 240 F. 2d 865; *Hargett* v. *Summerfield*, —— U.S. App. D.C. ——, —— F. 2d —— (No. 13169, decided March 21, 1957), *affirming* 137 F. Supp. 876; *Williams* v. *Cravens*, 93 U.S. App. D.C. 380, 210 F. 2d 874.

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,161

HENRY A. C. SAGGAU, APPELLANT

v.

PHILIP YOUNG, et al., Commissioners of Civil Service, and ARTHUR E. SUMMERFIELD, Postmaster General, APPELLEES.

Appeal from the United States District Court for the District of Columbia

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Decided December 27, 1956

Mr. Joseph Robbie, Jr., of the bar of the Supreme Court of Minnesota, *pro hac vice*, by special leave of court, for appellant. *Mr. Max M. Kampelman* was on the brief for appellant. *Mr. Arthur Lazarus, Jr.*, also entered an appearance for appellant.

Mr. Milton Eisenberg, Assistant United States Attorney, with whom *Messrs. Oliver Gasch*, United States Attorney, *Lewis Carroll*, Assistant United States Attorney, and *Robert L. Toomey*, Assistant United States Attorney at the time brief was filed, were on the brief, for appellees. *Mr. Leo A. Rover*, United States Attorney at the time record was filed, also entered an appearance for appellees.

Before FAHY, WASHINGTON and BASTIAN, Circuit Judges.

PER CURIAM: Appellant, Saggau, brought a civil action in the United States District Court for the District of Columbia asking that the court declare invalid the proposed removal of appellant from his office as postmaster at Ceylon, Minnesota, and that the charges against him be dismissed and expunged from his employment record.

It appears that letters of charges were filed against him by the Post Office Department, to which he duly replied; and, after consideration by the Department of the evidence submitted, including appellant's reply, he was ordered removed from his position. He thereupon appealed to the Ninth Regional Office of the Civil Service Commission, which, after hearing, affirmed the action of the agency; and he appealed, in turn, to the Civil Service Commission, which affirmed the action of the Regional Office.

This civil action was then instituted and, on motion, summary judgment was entered for appellees.[1]

This case clearly falls within that line of cases in which this court has held many times that it will not review the action of executive officials in dismissing executive employees, except to insure compliance with statutory requirements.[2] As in *Boylan* v. *Quarles*, —— U.S. App. D.C. ——, 235 F. 2d 834 (1956), there was here "[n]o substantial departure from applicable procedures, no misconstruction of governing legislation, nor any like error going to the heart of the administrative determination. . . ."

Appellant alleges further that the charges were "picayunish" and inspired by political considerations; and

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[1] Memorandum opinion of Judge McGarraghy is reported in *Saggau* v. *Young*, 138 F. Supp. 140 (1956).

[2] See, *e.g.*, *Blackmon* v. *Lee*, 92 U.S. App. D.C. 268, 205 F. 2d 13 (1953); *Carter* v. *Forrestal*, 85 U.S. App. D.C. 53, 175 F. 2d 364 (1949), *cert. denied*, 338 U.S. 832.

that, his removal having been for political reasons, it was prohibited by Civil Service regulations. Even assuming *arguendo*[3] that there was any reliable evidence that the charges were of such nature, this matter was investigated by the Regional Office and by the Civil Service Commission. Both held that the evidence of record disclosed that the decision of the Department in removing him was not unreasonable, arbitrary or capricious but was for such cause as would promote the efficiency of the service within the meaning of the Veterans' Preference Act, and that the evidence did not establish that appellant's removal was for political reasons, as prohibited by Civil Service regulations. We find no error.

We have examined the other contentions urged by appellant and find no error affecting substantial rights.

Affirmed.

[3] The scant evidence submitted by appellant to show the alleged political nature of the charges was entirely hearsay. After investigation which we think was procedurally correct, the Ninth Regional Office concluded that "Mr. Prull's hearsay testimony is not sufficient to warrant a conclusion that the adverse action was taken for political reasons rather than for the reasons stated in the letter of adverse decision." This was affirmed by the Civil Service Commission.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,169

NEWELL M. HARGETT, APPELLANT

v.

ARTHUR E. SUMMERFIELD, et al., APPELLEES

Appeal from the United States District Court
for the District of Columbia

Decided March 21, 1957

Mr. John R. Foley for appellant.

Mr. Milton Eisenberg, Assistant United States Attorney, with whom *Messrs. Oliver Gasch,* United States Attorney, *Lewis Carroll,* Assistant United States Attorney, and *Robert L. Tooney,* Assistant United States Attorney at the time brief was filed, were on the brief, for appellees. *Mr. Leo A. Rover,* United States Attorney at the time record was filed, and *Mr. Frank N. Strickler,* Assistant United States Attorney at the time record was filed, also entered appearances for appellees.

Before FAHY, WASHINGTON and BASTIAN, Circuit Judges.

BASTIAN, *Circuit Judge:* Appellant filed suit in the United States District Court asking that appellees be enjoined from removing him from his position as postmaster of the first class at Maysville, Kentucky, and that the removal action and decision against him be declared unlawful and void.

Letters of charges were filed by the Post Office Department against appellant, who is a Veterans' Preference

eligible. To these charges he made a timely reply and, thereafter, he was ordered removed from his position. He appealed to the Sixth Regional Office of the Civil Service Commission, which, after hearing, affirmed the action of the Post Office Department. On further appeal to the Civil Service Commission, the decision of the regional office was affirmed. This civil action was then filed and, on motion of appellees, summary judgment was entered in their favor.

In this court appellant raises two points: First, he says that only the President can remove a postmaster of the first class appointed by the President and confirmed by the Senate, and that, since the President has not participated in or ratified his removal, such action was therefore void. Secondly, he contends that the judicial review provisions of the Administrative Procedure Act[1] permit the courts to review administrative determinations in employee removal proceedings on the substantive merits.

As to the first contention: it is true that postmasters of the first class are appointed by the President. Previously it was provided by statutes that postmasters of the first, second and third classes were to be appointed by the President and were to hold office for four years, unless sooner removed or suspended by the President. The present statute, 39 U.S.C. § 31(a) (1952), provides that postmasters of the first, second and third classes are to be appointed in the *classified* service, without term, by the President, by and with the advice and consent of the Senate. It was provided also that the Veteran's Preference Act, 5 U.S.C. § 851-869 (1952), should apply to such appointments. Therefore appellant is removable in accordance with the same procedures as any other classified civil service employee and Veterans' Preference eligible. The record is clear that appellant was accorded all of the procedural protection provided by the applicable statutes.

[1] 5 U.S.C. §§ 1001-1011 (1952).

While it may technically be true that only the President has power to remove a postmaster, since the power to remove is incident to the power to appoint, *Burnap* v. *United States*, 252 U.S. 512, 519 (1919), the act of the Postmaster General here will be presumed to be the act of the President. *United States* v. *Farden*, 99 U.S. (9 Otto) 10, 19 (1878); *The Confiscation Cases*, 87 U.S. (20 Wall.) 92, 109 (1873). The decision in *Myers* v. *United States*, 272 U.S. 52 (1926), principally relied upon by appellant, affords him no support. In that case the President removed the postmaster. The Court sustained his right to do so without the advice and consent of the Senate to the removal.

We turn now to appellant's second contention, namely, with regard to the alleged effect of the judicial review provisions of the Administrative Procedure Act in civil service cases. That Act provides:

> "Except so far as . . . agency action is by law committed to agency discretion . . . [a]ny person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof." 5 U.S.C. § 1009 (a).

The question, whether removal of executive agency employees is a matter "by law committed to agency discretion", must therefore be considered at the outset.

The Supreme Court, in *Keim* v. *United States*, 177 U.S. 290 (1900), considered whether or not the courts may supervise the acts of an executive department head in discharging an employee. The Court's decision in that case clearly placed the removal of executive department employees within the ambit of executive discretion, and ruled that until Congress, by "special and direct legislation makes provision to the contrary", the courts could not review the soundness or propriety of the exercise of the department head's discretion.